IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 27TH JULY 2006 / 5TH SRAVANA 1928

TRC.No. 156 of 2000()

TA.137/1999 of STAT ADDL.BENCH, KOTTAYAM DT.26.11.1999.
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REVISION PETITIONER: RESPONDENT/ REVENUE

STATE OF KERALA REP.BY
DEPUTY COMMISSIONER (LAW),
COMMERCIAL TAXES, ERNAKULAM.

BY GOVERNMENT PLEADER

RESPONDENTS:

M/S.GENERAL RUBBERS, KOTTAYAM

BY

THIS TAX REVISION CASE HAVING BEEN FINALLY HEARD ON 27/07/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.N.RAMACHANDRAN NAIR & K.M.JOSEPH, JJ.

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T.R.C. No.156 of 2000

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Dated this the 27th day of July, 2006.

JUDGMENT

Ramachandran Nair, J.

The question raised in the T.R.C. filed by the State is whether the Assessing Officer has jurisdiction to bring to tax escaped turnover in the course of re-assessment taken up after remand by the appellate authority on appeal filed by the assessee against original assessment. The dispute pertains to levy of tax under Section 5A on purchases made from exempted SSI units for stock transfer to outside State. From the original assessment produced it is seen that the officer has not considered respondent's liability under Section 5A in respect of purchases. However, when the assessee contested the original assessment on two other issues, the appellate authority set aside the assessment vide order dated 6.1.1990 and remanded back to the Assessing Officer for "fresh disposal according to law". In the course of revised assessment completed on 28.11.1997, the assessing authority brought to tax purchases under Section 5A on the ground that purchases from suppliers who are not liable to pay tax attract levy of tax under Section 5A when the goods purchased are transferred outside the State other than by way of sale. When the respondent-assessee challenged the revised assessment in first appeal, the first appellate authority held that the remand was an open remand and so much so, it was within the powers of the assessing authority to make assessment afresh

and he has the authority to bring to tax turnover which was omitted in the original assessment. However, the Tribunal held that the assessing authority has no such powers to bring to tax escaped turnover in remand proceedings. The Tribunal examined the powers of the officer under Section 19(1) of the Act and held that the officer is not justified in assessing turnover under Section 5A in revised assessment proceedings because of the time bar of 4 years prescribed under the said Section. The Tribunal also held that the first appellate authority's order is not an open remand and the scope of the order is limited to consider only one issue left open by the appellate authority i.e. with regard to mill rent. Accordingly, the Tribunal allowed the appeal filed by the respondent-assessee and cancelled the revised assessment pertaining to Section 5A. It is against this order of the Tribunal the revision is filed by the State.

2. Even though repeated notice was served on the respondent-assessee, the respondent has not bothered to appear in court. Therefore, we proceed to dispose of the case after hearing the Special Government Pleader for the revision petitioner. Government Pleader cited two decisions of this court, one in KERALA HIDES AND SKINS V. STATE OF KERALA (2002) 1 KLT Short Note Case No.62 reported at page No.52 and the other in UNITED TIMBER AND CASHEW PRODUCTS (P) LTD. V. STATE OF KERALA (1988) 69 STC 250 and contended that when assessment is set aside and

remanded, it will be open to the officer to consider matters which were not considered at the time of original assessment. He therefore, contended that once assessment is set aside and remanded, there can be no scope for assessment of escaped turnover to apply limitation under Section 19(1) of the act. In the second decision referred to above, a Division Bench of this court has held as follows:

> "The fact that an item was not considered at the time of original assessment, if it is otherwise exigible to tax, will not deter or preclude the assessing authority from considering that matter at the time of revised or fresh assessment. When once an order of assessment is set aside and the matter is remitted to the assessing authority, the entire assessment proceedings are still pending. There can be no scope for any escaped assessment."

Even though the appellate authority was considering only the grounds raised by the assessee in the appeal filed against original assessment, the result of appeal is setting aside and remand for reconsideration in accordance with law. The question therefore to be considered is whether other issues can be brought in by the assessing authority in remand proceedings under Section 34(3)(a) of the KGST Act. While deciding an appeal against assessment or penalty the appellate authority can confirm, reduce, enhance or annul the assessment or the penalty or both. Therefore, it is upto the appellate authority to confirm, cancel or modify the assessment. In this case we find that the appellate authority while disposing of the appeal against original assessment, recorded the result of appeal "as set aside". Section 19(1) of the Act gives authority to

the officer to bring to tax escaped turnover within four years then and later five years from the expiry of the year to which tax relates. It is specifically provided under Section 19(3) of the Act that the power under sub-section(1) can be exercised by the assessing authority even if the original assessment has been subject matter of an appeal or revision. The question is whether Section 19(3) applies to this case or not. If Section 19(3) is applicable, then of course the Tribunal is right in holding that the Assessing Officer cannot bring to tax escaped turnover beyond the period of limitation. However, we are of the view of that the cases covered by Section 19(3) are cases where assessment is either confirmed, modified or cancelled by the appellate authority or in other words, when there is a merger of the assessment in the order in appeal so that the original assessment either survives or stand cancelled by virtue of the appellate order. However, when an assessment is set aside and remanded for making a fresh assessment, then no part of it survives until a revised order is issued by the Assessing Officer. In such a situation, the original assessment order is no longer available for the Assessing Officer to reconsider for modification under Section 19(1) of the Act. In this context we are in agreement with the observation of the Division Bench in the judgment abovereferrred wherein they have held that the question of escapement in a case of setting aside and remand does not arise at all. Therefore, after the assessment is set aside and remanded, the entire assessment is open to the

officer and he can initiate proposal for assessment of any turnover which was not considered in the original assessment. In this view of the matter, we are unable to sustain the order of the Tribunal holding that the assessment under Section 5A made in the course of re-assessment is barred by Section 19(1) of the Act or is not covered by the order of remand. We, therefore, set aside the order of the Tribunal and allow the T.R.C. However, if the respondent-assessee has any contest on merits against the assessment, it is for the respondent-assessee to move the Tribunal and the appeal will stand restored before the Tribunal for consideration of the issues on merits.

C.N.RAMACHANDRAN NAIR
Judge

K.M.JOSEPH
Judge

pms

C.N.RAMACHANDRAN NAIR &
K.M.JOSEH, JJ.

T.R.C. No.156 of 2000

JUDGMENT

Dated 27.7.2006